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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

RIN: 0750-AH43

Defense Federal Acquisition Regulation Supplement;

Utilization of Domestic Photovoltaic Devices (DFARS Case 2011-D046)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2011. The section provides that photovoltaic devices to be utilized in performance of any covered contract shall comply with the Buy American statute, subject to the exceptions provided in the Trade Agreements Act of 1979 or otherwise provided by law.

DATES: Effective date: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 76 FR 78858 on December 20, 2011 and also issued technical amendments to the interim rule in the Federal Register at 77 FR 13013 on March 5, 2012. One respondent submitted a comment in response to the interim rule.

II. Discussion and analysis

Only one response was received. The respondent provided an editorial comment which has been incorporated in the final rule (see DFARS 225.7017-3(c)(1)).

There have also been some baseline changes since the publication of the interim rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated

September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD expects that this interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq. Therefore, a final regulatory flexibility analysis has been prepared and is summarized as follows:

This final rule implements section 846 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383) by providing regulatory coverage on utilization of domestic photovoltaic devices under certain covered contracts.

The objective of the rule is to promote utilization of domestic photovoltaic devices under energy savings contracts, utility service contracts, or private housing contracts awarded by DoD, if such contract does not include DoD purchase of photovoltaic devices as end products, but will nevertheless result in ownership of photovoltaic devices by DoD. According to the statute, DoD is deemed to own a photovoltaic device if the device is—

(1) Installed on DoD property or in a facility owned by DoD;
and

(2) Reserved for the exclusive use of DoD for the full economic life of the device.

The legal basis for the rule is section 846 of the National Defense Authorization Act for Fiscal Year 2011.

No significant issues were raised by the public comments.

No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration.

This rule generally applies to other than small entities. When purchasing renewable power generated via on-site photovoltaic devices, DoD can either purchase the photovoltaic devices and thereby own, operate, and maintain the devices for their full economic life (already covered in DFARS part 225) or can do variations of the following:

- a. Enter into an energy savings performance contract, which is a contracting method in which the contractor provides capital to facilitate energy savings projects and maintains them in exchange for a portion of the energy savings generated. Under this arrangement, the Government would take title to the devices during contract performance or at the conclusion of the contract.

DLA Energy uses the master Department of Energy IDIQ contract and awards task orders off those contracts. Of the 16 contractors, all are large businesses. There are subcontracting goals that each contractor has to meet, but the ultimate task order award is made to a large business.

b. Enter into a power purchase agreement, also referred to as a utility service contract, for the purchase of the power output of photovoltaic devices that are installed on DoD land or buildings, but owned, operated, and maintained by the contractor. At the conclusion of the contract, DoD would either require the contractor to dismantle and remove the photovoltaic equipment, abandon the equipment in place, or would recompetethe requirement and if the incumbent contractor is the successful offeror, the follow-on contract would allow for continued power purchase from the existing devices. If the incumbent contractor is not the successful offeror, the contractor would be required to dismantle and remove the devices. While DLA has issued and received offers, none have been awarded, due to lack of economical feasibility. All offers received have been from large businesses, based on the capital costs involved in these projects. However, they tend to subcontract out the majority of work to smaller companies.

We do not currently have data available on whether any of the manufacturers of photovoltaic devices are small entities. This rule will promote utilization of domestic photovoltaic devices, even when the Government does not take title to the devices.

The requirements of the rule will not apply below the simplified acquisition threshold.

Since the prime contractors subject to this rule are large businesses, the reporting requirements will not impact small entities. Since the photovoltaic devices are commercially available off-the-shelf items, there will be no requirement to track to the origin of the components, but just to inform the prime contractor of the place of manufacture.

DoD did not identify any significant alternatives that would accomplish the objectives of the statute. There is no anticipated significant impact on small entities.

V. Paperwork Reduction Act

The rule imposes an information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. chapter 35, et seq. However, the new DFARS provision at 252.225-7018, Photovoltaic Devices—Certificate, does not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0229, entitled "Defense Federal Acquisition Regulation Supplement part 225, Foreign Acquisition, and related clauses," currently approved through November 30, 2013, in the amount of 147,944 hours. The proposed provision is a variant of the Buy American-trade agreements provisions that are already cleared.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Ynette R. Shelkin

Editor, Defense Acquisition Regulations System

Accordingly, the interim rule amending 48 CFR parts 212, 225, and 252, which was published at 76 FR 78858 on December 20, 2011, and amended by technical amendment published in the Federal Register at 77 FR 13013 on March 5, 2012, is adopted as a final rule with the following change:

1. The authority citation for 48 CFR part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

225.7017-3 [Amended]

2. Section 225.7017-3 is amended in paragraph (c)(1) by removing "see FAR 25.4" and adding "see FAR subpart 25.4" in its place.

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